REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

Signature .....

Date 22/11/2019

CASE NO: 1698/2019

In the matter between:

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| **BALULE NATURE RESERVE** | **APPLICANT** |
| **and** | |
| **HOEDSPRUIT FARMING ESTATES (PTY) LIMITED** | **FIRST RESPONDENT** |
| REGISTRATION NUMBER: 1968/007275/07 | |
| **OLIFANTS WEST NATURE RESERVE** | **SECOND RESPONDENT** |
| **YORK NATURE RESERVE** | **THIRD RESPONDENT** |

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**JUDGMENT**

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**MAKGOBA JP**

[1] In this application the Applicant seeks an order that:

1.1. The First Respondent be ordered to forthwith erect the boundry game fence that it removed between York 7 (First Respondent's farm) and the Second Respondent, approximately in extent of 550 meters;

1.2. The First Respondent be ordered to forthwith re-erect the boundary game fence that it removed between York 7 and the Third Respondent, approximately in the extent of 420 meters;

1.3. The First Respondent be ordered to re-erect the fences referred to *supra* in the same position that they were in prior to the First Respondent removal thereof.

1.4. The First Respondent be ordered to pay the costs of the application.

**Dramatis Personae**

[2] The following parties play a role in this application which is opposed by the First Respondent:

2.1. The Applicant, BALULE NATURE RESERVE ("Balule") is a duly established and constituted voluntary association, forming a body corporate of member private nature reserves, among others the Second Respondent and the Third Respondent and it is a member of the Associated Private Nature Reserves by agreement with the Kruger

National Park. The member private reserves, albeit owned by different owners, form a single reserve known as Bahule.

2.2. The First Respondent, HOEDSPRUIT FARMING ESTATE (PTY) LTD ("HFE") owns certain land known as Portion 7 (A Portion of Portion 2) of the Farm No. 188 Registration Division KT Limpopo Province ("York 7").

2.3. Both the Second Respondent, OLIFANTS WEST NATURE RESERVE ("OWNR") and the Third Respondent, YORK NATURE RESERVE ("YNR") are duly established and constituted voluntary associations of members who individually own private nature reserves as regional associations within the greater Balule. Both these nature reserves are members of Bahule.

2.4. Until 4 December 2018 there was a boundary fence between York 7 and OWNR and YNR, when the Applicant (HFE) removed same.

**Common Cause Facts**

[3] The following facts are either common cause or not disputed:

3.1. Balule is a duly established and constituted voluntary association forming a body corporate of member private reserves and a member of the Associated Private Nature Reserves by agreement with the Kruger National Park.

3.2. Both the OWNR and the YNR are duly established and constituted voluntary associations of members who individually own private nature reserves within the greater Balule.

3.3. Each of Balule, OWNR and YNR have their own constitutions governing or regulating their affairs. OWNR and YNR are regional associations affiliated to Balule.

3.4. HFE is the owner of York 7 and is neither a member of OWNR nor YNR. York 7 shares a common boundary with OWNR and YNR.

3.5. HFE removed the common boundary fence (approximately 550 meters on the OWNR southern boundary and approximately 420 meters on the YNR and York 7 boundary) in 4 December 2018. Neither Balule nor OWNR nor YNR gave any permission for the removal of the said fence.

**Relief sought by Balule**

[4] The Applicant, Balule avers from its founding affidavit that its application is a *mandament van spolie*, premised on the basis that OWNR and YNR, as members of Balule and accordingly Balule, were in the peaceful and undisturbed possession of the boundary fence and that HFE unlawfully dispossessed them. It avers further that the removal of a fence without a Court order or the permission of the possessor constitutes spoliation.

In this regard Counsel for the Applicant relied on the unreported decision of the Western Cape High Court in **Smuts v Benson & Others (A356/2014, 10989/2014) [2014] ZAWCHC 168 (12 November 2014)**.

**Issues for Determination or Adjudication**

[5] This Court must adjudge whether Balule is entitled to the relief claimed in the notice of motion.

[6] HFE has raised the following points *in limine*:

6.1. It is disputed that Ms Haussmann, the deponent to the founding affidavit, has the required approval and authority of Bahule to approach the Court on behalf of Bahule.

6.2. Bahule has not made out a case that it has to deal with matters of fencing, especially regarding the erecting or maintenance of fences (as same falls within the ambit of regional associations) or fences erected between two privately owned properties.

**Points *in Limine***

[7] In the founding affidavit, Ms Sharon Haussmann, the deponent, stated that:

*"1.2. I am the Chairperson of the Applicant's duly elected Management Committee and the facts deposed to herein are within my personal knowledge*

*and belief and are both true and correct. I am duly authorised to depose to this affidavit on behalf of the Applicant".*

[8] It is common cause that a copy of the resolution adopted by the Management Committee of the Applicant authorizing the deponent as alleged was not attached to the founding affidavit. No such resolution was produced in the replying affidavit or at the hearing of this application.

[9] HFE raised a point *in limine* with regard to the required approval and authority of Ms Haussmann to approach the Court on behalf of Balule. For the sake of convenience I quote verbatim paragraph 3 of HFE answering affidavit:

*"3.....*

*3.1. Firstly, it is disputed that Ms Haussmann has the required approval and authority to approach the court on behalf of Balule. A notice in terms of rule 7 has been served on Balule's attorney in this regard. Once a response to this notice has been received, I will further deal with this issue. Insofar as it may be required, I reserve the right to file a further affidavit in order for me to deal with Ms Haussmann's authority and that of Balule to act, or the lack thereof;*

*3.2. Secondly, whilst it is accepted that Balule has the required legal standing to launch court proceedings in terms of its constitution, it has not made out a case affording it the required authority to deal with*

*matters of fencing. It is also not a landowner, owning property adjacent to that of Hoedspruit Farming. The above involves two distinct questions: -*

*3.2.1. One, as far as I am aware, Balule's constitution does not, as part of the powers of the association, provide for the erection or maintenance of fences. This, on my understanding, is a matter that either falls in the ambit of those regional associations who are members of Balule in so far as their constitutions empower the associations to do so or neighbouring property owners who are members of the regional associations viz-a-viz their common law rights. I propose to hereinbelow give the court a full exposition, together with an organogram, of the different entities and associations which come into play.*

*3.2.2. Two, even if Balule's constitution does provide for the erection or maintenance of fences, which it does not, or should it otherwise authorize Balule to deal with fencing matters, then Balule still has no say regarding fences erected between two privately owned properties. Its powers and jurisdiction, if it has any, is limited to the outside perimeter fences of the reserve. I propose to demonstrate below that Hoedspruit Farming's property falls squarely within the boundaries of the Balule reserve. It is not situated on the boundary of the reserve, nor is any of its perimeter fences a perimeter fence to the reserve."*

[10] In reply to the above challenge on the authority of Ms Haussmann to approach the Court on behalf of Bahule, the deponent stated:

*"ADD PARA 3*

*3.1. I am the duly elected Chairperson of the Applicant's Management Committee. As such, I am certainly authorised to dispose to an affidavit on its behalf. I carry the full support of the Committee in doing so.*

*Paragraph 12.12 of the Applicant's constitution provides that:*

*"The Chairman of the CONSTITUTION (sic) or such other COMMITTEE member as the COMMITTEE may nominate, shall be the duly authorised representative of the "ASSOCIATION" in any legal proceedings brought by or against the Association.*

*"ASSOCIATION" is defined in the Applicant's Constitution as being the Balule Nature Reserve."*

[11] The deponent to the founding affidavit, Ms Haussmann, still did not attach a copy of the resolution authorizing her to act on behalf of Balule in her replying affidavit. It is appropriate at this juncture to state the following clauses in the Constitution of Balule:

*"12.9. Any resolution of the COMMITTEE shall be passed by a two thirds majority of votes.*

*12.10. A signed resolution of the COMMITTEE passed by a two thirds majority of votes shall be as effective and valid as if it had been passed by a meeting of the COMMITTEE."*

I may mention that it is not known whether the authority allegedly given to Ms Haussmann is in terms of a resolution that complies with the above provisions of the Balule Constitution.

[12] The law regarding the authority of a representative of a company or voluntary association to represent such corporate body is clear in the light of the decided cases referred to hereunder.

[13] In **Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd**[1], and in an application by a company the respondent took an objection *in limine* that there was no proper proof before Court that the application had been duly authorised by the applicant.

The applicant contended that it was implied in the affidavit of the managing director who was also the majority shareholder. The Court rejected the contention by the applicant and upheld the point *in limine* to the effect that there was no proper proof that the application had been duly authorised. Corbett J (as he then was) said the following at page 252 F

*"In the present case the founding affidavit makes no express mention of authorization by the Company acting through its board of directors. The question of authority has been challenged in the opposing affidavit, and thus the onus is upon the applicant to show that the application has been*

[1] 1972 (4) SA 249 (CPD)

*authorised by the directors of the Company. In as much as no contrary evidence had been placed before the Court by the respondent, the "minimum of evidence" to use the words of Watermeyer J in Mall's case will suffice."*

[14] The leaned judge went on to raise some unanswered questions at page 255G-H, to come to a conclusion that the proceedings by the applicant were not authorised:

*"If, as seems possible, no formal resolution of the board of directors was taken, then in what way was this application authorised?*

*And, if the board did purport to authorize the application in some manner other than by formal resolution, was such manner of authorization in accordance with the constitution of the applicant?"*

The leaned Judge concluded that simply to aver that directors have authorised an application amounts to an assertion of a legal conclusion rather than a factual allegation.

[15] In the case of **Mall (Cape) (Pty) Ltd v Merino Ko-operative Bpk**[2] the question as to the proof required of authority to institute legal proceedings on behalf of an artificial person such as a company was fully considered by Watermeyer J, who stated the position as follows at pp 351-352:

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[2] 1957 (2) SA 347 (CPD)

*"I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before Court to show that the applicant has duly authorised the institution of notice of motion proceedings. (see for example Royal Worcester Corset Co. v Kesler's Stores, 1927 C.P.D. 143; Langeberg Ko-operasie Beperk v Folscher and Another, 1950 (2) S.A. 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example Lurie Brothers Ltd v Archache, 1927 N.P.D 139, and the other cases mentioned in Herbstein and van Winsen, Civil Practice of the Superior Courts in South Africa, at pp. 37, 38). This seems to*

*me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before Court, then I consider that a minimum evidence will be required from the applicant (cf. Parons v Barkly East Municipality, supra; Thelma Court Flats (Pty) v McSwigin, 1954 (3) S.A 457 (C)).*"

[16] The decision in **Mall** was referred to with approval by Ogilve Thompson JA (as he then was) in the case of **Pretoria City Council v Meerlust Investments Ltd**[3] at page 325, where the learned Judge of Appeal stated the following:

*"The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council: that it is the Council which is prosecuting the appeal and not some unauthorized person on its behalf. (cf Mall (Cape) (Pty) Ltd v Merino Ko-operasi Bpk 1957 (2) SA 347 (C) at pp 351-2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of the resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact the proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before this Court an appropriately worded resolution of the Council".*

[17] In the present case the deponent to the founding affidavit (Ms Haussmann) failed to produce a resolution passed by the Management Committee of Balule to the effect that she is authorised to institute legal proceedings on behalf of the voluntary association, being Balule. In terms of the constitution of

[3] 1962 (1) SA 321 (AD) at page 325

Balule such resolution has to be passed or adopted by a two third majority of members.

In the circumstance I make a finding that Ms Haussmann was not duly authorised to act on behalf of Balule in this application.

[18] Counsel for the Applicant (Balule) argued that the point *in limine* raised by HFE is unmeritorious for the following reason:

In application proceedings it is the institution of the proceedings and the prosecution thereof which must be authorised and it is irrelevant whether the deponent has been authorised to depose to the founding affidavit. Reference in this regard was made to the case of **Ganes v Telkom Namibia**[4]. The principle laid down in **Ganes** is that a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. That it is the institution of the proceedings and the prosecution thereof which must be authorised[5].

[19] I agree that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. This is so because such a deponent is in a position of a witness and act as such in the proceedings. A witness need not be authorised to give evidence in a case.

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[4] 2004 (3) SA 615 (SCA) 624 G-J

[5] See also Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C-J

In the present case it would mean that Ms Haussmann need not be authorised to depose to her affidavit. However the crux of the matter in the present case is that the Management Committee of Balule did not pass or adopt a resolution authorizing the Court proceedings and appointing Ms Haussmann to act on behalf of Balule in such Court proceedings. Needless to say that no resolution was attached to the founding affidavit. In the circumstances I still maintain that the point *in limine* of lack of authority on the part of Ms Hanssmann was well taken as she was not authorised to prosecute the institution of the present application.

[20] The second point *in limine* raised by HFE is that Balule has not made out a case that it has to deal with matters of fencing as same falls within the ambit of the regional associations, for example OWNR and YNR.

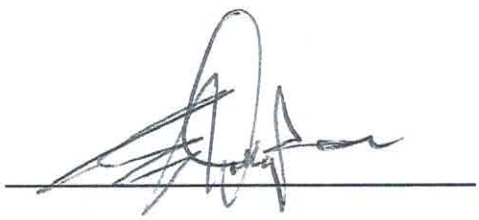
This point *in limine* was raised by HFE in paragraph 3.2 of its answering affidavit. In the replying affidavit Balule did not deal with or reply to the allegations put forward by HFE. The allegations will accordingly remain as uncontested and this Court will make a determination in this regard.

[21] On the basis of these uncontested facts I am of the view that the Applicant (Balule) has failed to set out a cause of action in its application. HFE is neither a member of OWNR (Second Respondent) or YNR (Third Respondent) nor is it a member of the Applicant (Balule). Accordingly and for as long as HFE is

associations, nor Balule, have any jurisdiction or say over HFE or its property[6]. Such rights, as they may have, will only come into existence once NFE becomes a member of these associations.

NFE is not bound by any of the aforementioned parties' constitutions. The removal of boundary fences or internal fences on HFE's property remains a private matter between HFE and its neighbours. Balule has, accordingly failed to set out a cause of action in this application.

[22] The two points *in limine* raised by the First Respondent (HFE) are upheld and the application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel.



**E M MAKGOBA**
**JUDGE PRESIDENT OF THE**
**HIGH COURT, LIMPOPO**
**DIVISION, POLOKWANE**

[6] See Rowles v Jockey Club of SA and Others 1954 (1) SA 363 (A) at 364C; Herbex v Advertising Standards Authority 2016 (5) SA 557 (GJ) para [25] to [29] at 565B-H; Mount Edgecombe Country Club Estate v Singh 2019 (4) SA 471 (SCA) para [9] at 479G-H and para [20] to [25] at 480/1.

## APPEARANCES

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| Heard on | : 13 November 2019 |
| Judgment delivered on | : 22 November 2019 |
| For the Applicant | : Adv. D B du Preez SC |
| | Adv. P J de Necker |
| Instructed | : WDT Attorneys |
| | c/o Kampherbeek & Pogrund Attorneys |
| For the 1st, 2nd & 3th Respondents | : Adv. R Stockwell SC |
| | Adv W C Carstens |
| Instructed by | : Askingon Attorneys |
| | c/o Steytler Nel & Partners |